

Glassman v ProHealth Ambulatory Surgery Ctr., Inc.
2010 NY Slip Op 32679(U)
September 16, 2010
Sup Ct, Nassau County
Docket Number: 009774/2001
Judge: Ira B. Warshawsky
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MEMORANDUMSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 8

KEVIN GLASSMAN, M.D.,

Plaintiff,

INDEX NO.: 009774/2001

-against-

**DECISION ON
DEFENDANTS' REQUEST
FOR A BILL OF COSTS**
_____ProHEALTH AMBULATORY SURGERY CENTER,
INC. and ProHEALTH CORPORATION,Defendants.

The defendant appealed this Court's decision after trial to the Appellate Division, Second Department, which affirmed the trial court. It then appealed to the Court of Appeals.

The Court of Appeals reversed one part of this Court's decision after trial stating that the judgment was "reversed with costs and case remitted to Supreme Court . . . for further proceedings in accordance with the memorandum herein." More specifically, the "Supreme Court shall consider whether defendant is entitled, under the terms of the agreement, to a set off derived from the funds, if any, held by plaintiff, against the amount of recovery in this case. We see no reason to disturb the remaining conclusions of the courts below."

Defendant submitted its Bill of Costs to the Clerk who approved them over objection of plaintiff. Plaintiff has requested that the Court review the costs, contending they are not "reasonable." It has submitted a two page letter memo with exhibits, including the nine page "Objections to Bill of Costs" filed with the Clerk.

The defendant has submitted a twelve page "Response to Plaintiff's Objections to ProHealth's Bill of Costs." The Bill of Costs submitted by defendant was as follows:

COSTS

Appeal to Court of Appeals, CPLR § 8204	\$500.00	
		<u>\$500.00</u>

DISBURSEMENTS

Fee for Filing for Record On Appeal, CPLR § 8022(b)	\$315.00	
Reasonable expenses actually incurred in securing an undertaking to stay enforcement of a judgment subsequently reversed, CPLR § 8301(a)(11)	\$100,086.58	
Appellate Printer Bills, CPLR § 8301(a)(6) and (12)	\$18,874.93	
		<u>\$119,276.51</u>

TOTAL COSTS AND DISBURSEMENTS \$119,776.51

It is clear as the victorious party on appeal, even though only on a portion of this Court's decision after trial, that ProHealth is entitled to costs. (CPLR § 8307). Under CPLR § 8301(a), the defendant is entitled to tax necessary disbursements for:

- (6) Reasonable expenses of printing the papers for a hearing, when required;
-
- (11) Reasonable expenses actually incurred in securing an undertaking to stay the enforcement of a judgment subsequently reversed;
- (12) Such other reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court.

The above sections facially support claims for the costs of two appeal bonds as well as printing costs. These major costs were \$100,086.58 for the undertaking and \$18,874.93 for appellate printing.

Plaintiff's objections to the Bill of Costs are manifold. Most specifically as noted above, CPLR § 8301(a)(11) allows for recovery of the costs of an undertaking that stayed enforcement of a judgment subsequently reversed. ProHealth stayed two judgments of this Court. One was the actual judgment after trial and the other was a separate judgment on attorney's fees awarded to plaintiff.

Plaintiff's have objected because the undertakings are still in place and should not be released (subject matter of a separate motion pending before this Court). Further, that the Fees Judgment was not reversed by the Court of Appeals and, therefore, the costs of bond posted on that judgment are not recoverable.

Plaintiff further argues that there should be no awarding of costs for the redundant printing of materials, materials that were not even relevant to the appeal. They also argue that, while the Court of Appeals requires the printing of twenty-four copies of the record (a 6,000 page record), and service of three copies on plaintiff, defendant printed thirty-one copies. Plaintiff should not be responsible for additional copies over that number so they argue.

Plaintiff also argues that where no proof has been provided by defendant of payment of costs, they should not be responsible for said payment.

Plaintiff further argues that costs on the undertakings is premature because the Court has not rendered a decision on the remittitur from the Court of Appeals. Further, there should be no costs on the undertaking for the Attorney's Fees Judgment, since it was not appealed to the Appellate Division. The attorney's fees issue was not appealed to the Court of Appeals nor did the Court of Appeals refer to the judgment on attorney's fees in its decision.

A further expense claimed by defendant is commissions on a letter of credit with respect to the judgment. The invoices for the commissions was \$40,250.68. The invoices for the bond premiums was \$41,336.00. These have not been fully paid, but have been incurred. (Amount paid for March 7, 2007 judgment undertaking — \$10,334.00, dated May 23, 2007. Amount paid for Attorney's Fees Judgment — \$9,250.00, dated January 20, 2009.)

Printer fee invoices reflect no payments. Rather, we have one of August 28,

2009 for \$11,969.45, and a second dated December 20, 2009 for \$950.93. On both invoices "Payments Credits" is marked as \$0.00.

Defendant's Response

Printing Costs — Defendant argues that printing the entire record was necessary because they raised issues involving motions to amend, summary judgment motions, as well as that directed at trial testimony and the Court's post-trial decision.

Ruling — The Court cannot determine that the record that was ordered was not necessary to the issues raised by defendant on appeal. The fact that the Court of Appeals does not specifically rule on more than one issue does not mean that the record produced was not needed or required.

Copies of the Record — Defendant was required to produce an original, twenty-four copies for the court, and three copies for the plaintiff. They kept three copies for themselves. Defendant was entitled to the same number of copies produced for plaintiff.

Ruling — The issue of duplication appears to be without foundation. For example, a copy of an agreement located in a motion may also be found in a trial exhibit or in a motion to reargue. Each of these were copied as part of the record on appeal. To have copied the agreement in one place and not the other makes no sense.

The plaintiff's request to reduce the printing portion of the Bill of Costs is denied.

Costs Incurred in Securing Two Appellate Bonds

Defendant argues that its cost incurred in obtaining the bonds was reasonable, including that of the letter of credit fees paid by ProHealth, paid in order to maintain the bond.

ProHealth states they were required to provide the bonding company with a letter of credit for the amount of the bond. Thus, they must pay quarterly fees to keep the letter of credit in place. Therefore, in addition to the annual bond premiums, they argue they are entitled to the credit line commissions that they have paid.

Ruling — Without documentary proof that the credit line was a requirement for obtaining the bond, the Court will not allow the credit line payments as billable costs.

The Attorney's Fees Judgment Bond

Plaintiff argues there has never been a reversal of the judgment of attorney's fees.

Defendant contends that the Court of Appeals reversed the Final Judgment of this Court which included the attorney's fees ruling/stip. Defendant argues that plaintiff has a "misunderstanding of the nature of the Appellate Practice . . . and the nature of ProHealth's appeal to the Court of Appeals in this particular case."

According to defendant:

23. Based on this Court's decision after trial, a Judgment in the amount of \$1,153,449.95, representing the damages awarded by this Court, plus pre-judgment interest, was entered on March 12, 2007 (the "initial Judgment"). ProHEALTH appealed from this initial Judgment to the Appellate Division. In order to stay enforcement of the initial Judgment pending appeal, ProHEALTH secured an appeal bond pursuant to CPLR § 5519. On October 7, 2008, the Appellate Division, Second Department, affirmed the initial Judgment.

24. The parties entered into a stipulation, fixing the amount of plaintiff's attorney's fees (which had been previously awarded by this Court to plaintiff) through December 30, 2008 at \$925,000.00. In this stipulation, ProHEALTH agreed to post a second appeal bond to secure the soon to be entered "Attorney's Fees Judgment." Based on the stipulation, an award of attorney's fees in the amount of \$925,000.00 was fixed in a Final Judgment (or an Attorney's Fees Judgment) dated January 13, 2009, and entered on January 16, 2009. Pursuant to the stipulation, ProHEALTH secured an appeal bond for the Attorney's Fees Judgment.

25. Subsequently, ProHEALTH sought leave to appeal the Attorney's Fees Judgment to the Court of Appeals, which granted ProHEALTH's application. Such appeal brought up for review all prior Judgments and Orders entered in this action by this Court and the Appellate Division. On June 3, 2010, the Court of Appeals reversed, with costs, the Judgment appealed from, i.e., the Attorney's Fees Judgment, as well as the October 2008 Appellate Division Order that had affirmed the initial Judgment. Thus, neither Judgment remains in effect after the Court of Appeals' decision.

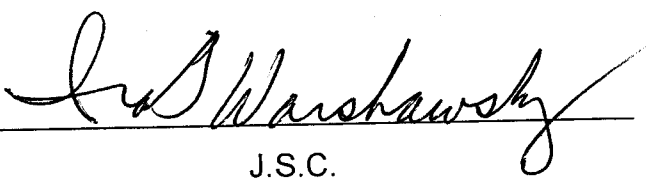
Ruling — The defense bonded the Attorney's Fees Judgment. It did not appeal the Attorney's Fees Judgment. The stipulation that settled the attorney's fees issue precluded an appeal of the Attorney's Fees Judgment. (See paragraph 3 of

Stipulation). The cost of bonding the Attorney's Fees Judgment is not a reasonable cost of the appeal to the Court of Appeals that is recoverable as a billable cost. (See paragraphs 4 and 5 of Stipulation).

Upon submission to the Court of documentation that supports the necessity of maintaining the credit line, the Court will issue an order on allowable costs.

In the interim, collection/enforcement of the previously issued Bill of Costs is stayed until further determination of the Court.

Dated: September 16, 2010



J.S.C.

ENTERED
SEP 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE